

Issue: Group III Written Notice with Suspension (unsatisfactory performance, failure to follow instructions/policy, and insubordination; Hearing Date: 08/29/18; Decision Issued: 09/19/18; Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 11234; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11234

Hearing Date: August 29, 2018
Decision Issued: September 19, 2018

PROCEDURAL HISTORY

On April 2, 2018, Grievant was issued a Group III Written Notice of disciplinary action with twelve workday suspension for unsatisfactory performance, failure to follow policy or instruction, and insubordination.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 12, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 29, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
University Party Designee
University's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Virginia State University employs Grievant as an Administrative and Program Specialist II. Her duties include:

Provide office support by maintaining automated systems and files, reports, and records, manages and monitors the budget, and performing other duties which include supervising work-study students and administrative assistant(s).¹

She began working for the University on March 10, 2016. No evidence of prior active disciplinary action was introduced during the hearing.

On May 12, 2017, Grievant received an Interim Performance Evaluation Form containing Performance Areas Identified for Enhancement/Improvement. One of these items was:

Completes all assignments within established guidelines and timelines.²

¹ Agency Exhibit II.

² Agency Exhibit III.

The University presented numerous factual scenarios to support its disciplinary action. Many of those factual scenarios were not substantiated³ or did not rise higher than a Group 1 offense. Some of the facts related to Grievant's actions after April 2, 2018 when the Written Notice was issued. Accordingly, the Hearing Officer will not address those factual scenarios.

The Former Dean left the University in July 2017. She was replaced by the Dean. Grievant began reporting to Mr. P and then to the Dean in December 2017. The Associate Vice President began working for the University on August 27, 2017.

On February 5, 2018 at 6:43 p.m., the Dean sent Grievant an email:

Please retype the attached PDF EWP⁴ on the attached EWP word template so that it can be easily updated. Please send the EWP back to me in a word document by 3 p.m., Thursday, February 8, 2018. Please let me know if you have any questions.

On February 13, 2018 at 6:30 p.m., the Dean sent Grievant in the email:

Good Evening.
What is the status of this?

On February 15, 2018 at 11:11 AM, Grievant replied by email:

Good Morning.
I do apologize I completed this a few weeks ago when you sent it to me but it was sitting in my draft folder.
See attached document.

On February 15, 2018 at 5:28 p.m., the Dean sent Grievant an email:

Thanks. Please go back and add the information for #19 Measures for Core Responsibilities and for #21 Measures for Special Assignments/Additional Evaluation Factors and send it back to me by 2 p.m. Friday, February 16, 2018.

On February 26, 2018 at 1:54 p.m., the Dean sent Grievant an email:

Good Afternoon.
What is the status of this?

³ For example, the University alleged Grievant signed contracts without authority on behalf of the University but did not provide copies of the signed contracts.

⁴ EWP refers to Employee Work Profile.

On February 27, 2018 at 8:23 a.m., Grievant sent the revised EWP to the Dean.

Ms. R was doing a favor for the Associate Vice President and his unit. Ms. R needed certain information and Grievant was responsible for sending it to Ms. R.

On March 29, 2018 at 11:05 a.m., the Associate Vice President sent Grievant an email:

[Ms. R] has been trying to reach you and state she emailed you back on March 13 regarding eight discrepancies with [vendor]. They have threatened to contact the President's Office and claim they have not heard back from VSU. [Ms. R] can be reached at [number]. Please call her today and provide me with an update on the status of the issue with [vendor] today.

On March 29, 2018 at 11:30 a.m., Grievant sent the Associate Vice President an email:

This matter was taking care of yesterday with [Mr. P]. Paperwork was sent back to invoice processing.

On March 29, 2018 at 12:36 p.m., the Associate Vice President sent Grievant an email:

I value your personality and passion for our students, but am concerned with your decision-making as it relates to providing professional responses in a timely manner and fact checking. I asked you to contact [Ms. R] and your response was that the "matter was taking care of yesterday and the paperwork was sent to Purchasing". After I asked you to double check we find that the documents were not submitted hence [Ms. J] calling me. Do you realize the impression this makes on our university partners?

In my role as AVP, I have to have confidence in every layer of our Division and to be assured that everyone response to emails, completes work in excellence, put students first and has passion for the work we are responsible for in our Division. At this time, after such egregious oversights, errors and miscommunication, I am requiring you to have a meeting with [the Dean]. This dilemma today took away almost an entire hour of my day as well as [Ms. R's], not to mention the frustration of a vendor who is also an alumnus of VSU. I need everyone to take extra care in the work we do in representing this Division.

Please send a letter of apology to [Ms. R] and prepare a letter for the vendor impacted by this so that I may review. This needs to be completed

prior to the close of business today. Failure to adhere to this directive could result in disciplinary action.⁵

The Associate Vice President needed Grievant to send a written apology so that he could show his supervisors in the event Ms. R or the vendor complained again. Grievant did not send a letter of apology to Ms. R prior to the close of business on March 29, 2018 as instructed.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”⁶ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Unsatisfactory work performance is a Group I offense. Failure to follow instructions or policies is a Group II Offense. Insubordination is a Group II offense. Grievant’s behavior was not sufficient to justify elevation of a Group II offense to a Group III offense and, thus, Grievant may not receive greater than a Group II Written Notice with a ten work day suspension. The Hearing Officer will address the facts and policy regarding a Group II offense.

Failure to follow a supervisor’s instructions is a Group II offense.⁷ In May 2017, Grievant was reminded of her duty to complete all assignments within established guidelines and timelines. On February 5, 2018, Grievant was instructed to finish drafting an EWP by February 8, 2018. Grievant failed to finish the assignment. When reminded on February 13, 2018 (after business hours), Grievant provided an incomplete draft on February 15, 2018. She was instructed on February 15, 2018 (after business hours) to complete revisions by 2 p.m. on February 16, 2018 but failed to meet that deadline. She was reminded again on February 26, 2018 and completed the assignment on February 27, 2018. On March 29, 2018, Grievant was instructed to apologize to Ms. R by close of business that day. Grievant did not send an apology to Ms. R by the close of business March 29, 2018. The University has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant’s suspension must be reduced from 12 work days to ten work days.

⁵ Agency Exhibit IV.

⁶ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁷ See, Attachment A, DHRM Policy 1.60.

Grievant argued that she was subject to multiple managers and her work duties were not well-defined. Grievant's assertion is true but does not affect the outcome of this case because the instructions given to Grievant were clear and within her ability to perform.

Grievant asserted that she apologized to Ms. R by sending an email on March 30, 2018 at 3:26 p.m. The Associate Vice President's instruction was to send the apology by the end of the business day on March 29, 2018. Grievant was warned that failing to do so could result in disciplinary action. No evidence was presented showing that Grievant did not receive the instruction in time to complete the instruction by the close of business March 29, 2018. The Agency has presented sufficient evidence to show that Grievant failed to follow a supervisor's instructions.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁸ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a twelve work day suspension is **reduced** to a Group II Written Notice with a ten work day suspension. The Agency is directed to provide the Grievant with two work days of **back pay**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

⁸ Va. Code § 2.2-3005.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.